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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 14

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

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No. 606

INTERSTATE COMMERCE COMMISSION,

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Middle District of Florida is reported at 213 F. Supp. 199, and is reproduced in the printed record (R. 28-37).

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 334 F. 2d 46, and is reproduced in the petition (Appendix 1a-13a).

Question Presented

Do district courts have jurisdiction under Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and Sections 1336 and 1398 of the Judiciary and Judicial Procedure, 28 U.S.C. §§ 1336 and 1398, of suits by railroads to set aside the administrative and quasi-judicial findings of the Interstate Commerce Commission and reparation award-orders based thereon? Or must such suits be dismissed on the ground that the findings and orders must be challenged as a defense in shippers' suits under Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2) if, as, when, and where brought?

Statutes Involved

The provisions of the statutes pertinent to this proceeding are Sections 16(2) and 17(9) of the Interstate Commerce Act 49, U.S.C. § 16(2) and § 17(9); Sections 1336 and 1398 of Judiciary and Judicial Procedure, 28 U.S.C. § 1336 and § 1398, and Sections 1001 (d), (f), and (g), and 1009(a) of the Administrative Procedure Act 5 U.S.C. § 1001(d), (f), and (g), and § 1009(a).

The first four of these provisions are printed in the petition (15a-16a). The provisions of the Administrative Procedure Act referred to are set forth in the appendix hereof (1b).

Statement of the Case

In *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25, and 311 I.C.C. 315 (R. 6-19), the Interstate Commerce Commission found the rates assessed on more than 600 carload shipments of phosphate rock from Prairie, Fla., to destinations in Illinois during the period from April 10, 1945, to December 31, 1950, unjust and unreason-

able, and awarded reparation aggregating $8,889.76, with interest. By orders of the Commission the railroads were "authorized and directed" to pay the reparation on or before August 28, 1961.

By complaint filed September 6, 1961 (R. 20-25) the respondents brought suit against the United States of America and the Interstate Commerce Commission in the United States District Court for the Middle District of Florida under the provisions of Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9) and Sections 1336 and 1398 of Judiciary and Judicial Procedure, 28 U.S.C. §§ 1336 and 1398, to enjoin, set aside and annul the administrative and quasi-judicial findings of the Commission in the aforesaid proceedings, as well as the award-order based thereon. Among other things, the complaint alleged that the Commission erred in failing to find the proceeding before it barred by the statute of limitations of the Interstate Commerce Act, 49 U.S.C. § 16(3), in failing to observe and properly apply its own rules of practice, and in allowing prosecution of a complaint seeking damages by a corporation which had been dissolved five years previously.

By answer filed on January 5, 1962, the petitioner admitted, without qualification, all of the jurisdictional allegations of the complaint. However, on April 20, 1962, the petitioner moved the court to dismiss the complaint "for lack of jurisdiction of the subject matter, or in the exercise of its equity discretion".

By answer made on or about January 12, 1962, the United States of America neither defended nor opposed the Commission orders, pointing out that "the Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission's orders", that the Commission "will avail itself of the statutory authorization to interpose all defenses to the plaintiffs' charges possible of being interposed", and that "the

shipper, if it so elects, may present its position through its own counsel".

The District Court denied the petitioner's motion to dismiss on May 15, 1962 (R. 26).

On August 22, 1962, a suit was filed on behalf of the Thomson Phosphate Company in the United States District Court for the Southern District of New York, seeking damages based on the orders of the Commission heretofore referred to. By stipulation of the parties, that complaint is being held in abeyance pending final disposition of the instant proceeding.

On January 9, 1963, the Florida District Court found the reports and orders of the Commission unlawful and set them aside (R. 27-37).

The petitioner appealed from the judgment of the District Court. It did not appeal the findings of the District Court on the merits, but only the question of the court's jurisdiction (R. 4).

On July 8, 1964, the United States Court of Appeals for the Fifth Circuit affirmed the decision and judgment of the District Court, holding that the District Court was correct in overruling the motion to dismiss, in sustaining the right of judicial review in that court under §§ 1336 and 1398, and in rejecting the contention that review had to be in the pending New York action. The Court of Appeals also concluded that the contention that the trial Court having jurisdiction should nevertheless have declined to exercise it for equitable considerations was without merit.

Argument

As the Court of Appeals quite properly indicated (7a), this case is important because of the necessity to determine "the statutory mechanism for review in reparation award order cases generally, not merely the machinery which

would satisfy this particular case". It is essential, therefore, that the nature and effect of administrative findings and reparation award orders based thereon be clearly defined.

In *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, one of the leading cases on the primary jurisdiction of the Commission, this Court made it abundantly clear that there are two separate and distinct aspects to a reparation award. The first is the finding that the assailed rates and charges are unlawful in violation of the Interstate Commerce Act, and the second is the finding as to the fact and the amount of damage. The Court characterized (p. 258) the first as an administrative finding, and the second as a quasi-judicial finding. The Court said that in a suit by a shipper for damages under § 16(2) the administrative finding of unlawfulness is "conclusive", that the quasi-judicial finding of the fact and amount of damage is only *prima facie* correct, and that only as to the latter finding does the carrier have "its day in court and the right to a judicial hearing". In short, the *Mitchell Coal* case holds that the carrier may not have a judicial hearing under § 16(2) on the administrative finding of unlawfulness, that finding being conclusive and binding upon carriers, unless and until it is set aside by the Commission itself, or by a court of competent jurisdiction.

Moreover, as the Court said in that case, award orders "can be given general and uniform operation since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order". Thus, under Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, so long as an administrative finding of unlawfulness is outstanding and not enjoined, suspended or set aside, every other shipper similarly situated is entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662.

The Court of Appeals recognized the significance of the dual nature of award orders and the settled law with respect to the general effect of such award orders (8a).

I

The decision below is clearly correct.

The jurisdiction of the District Court was the only issue raised on appeal. Prior decisions by this Court make it clear that the decision below was correct.

A. The District Court had jurisdiction under Section 17(9) of the Interstate Commerce Act and Sections 1336 and 1398 of the Judiciary and Judicial Procedure.

Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9)),* provides that when a petition for reconsideration of a decision, order, or requirement of the Commission shall have been made and denied or otherwise disposed of, a suit to enjoin, suspend or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under the provisions of law applicable to such suits, *but not otherwise.* There is nothing in the language of that section which excludes from its provisions orders of the kind here assailed. On the contrary, the language of that section specifically authorizes the filing of suits to enjoin, suspend, or set aside *any* decision, order, or requirement of the Commission.

Section 1336 of Judiciary and Judicial Procedure, 28 U.S.C. § 1336,* expressly gives the district courts jurisdiction of such actions, and § 1398 thereof* expressly fixes the venue of such actions as the judicial district wherein

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* Sometimes hereinafter referred to simply as § 17(9), § 1336 and § 1398 or §§ 17(9), 1336 and 1398.

is the residence or principal office of any of the parties bringing such action.

This Court has already decided that findings and orders relating to money damages are reviewable by a one-judge district court in a suit brought under the provisions of §§ 17(9), 1336 and 1398. *United States* v. *I.C.C.*, 337 U. S. 426; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202.

In *United States* v. *I.C.C., supra*, the United States as a shipper brought an action to set aside a Commission denial of reparation and an order dismissing the complaint. This Court held that the legal consequences of the order there assailed fell "squarely within the type made subject to judicial review by § 41(28)",* that a Commission order dismissing a shipper's claim for damages is an "order" subject to challenge under § 1336, and that judicial review of such an order does not require a three-judge court.

In the dissenting opinion of Mr. Justice Frankfurter in that case, an attempt was made to read into the language of Section 17(9) by implication the words "provided the decision, order, or requirement is not one for money damages". That construction of the provisions of Section 17(9) was rejected by the majority of the Court, and it was completely abandoned in *Pennsylvania R. Co.* v. *United States, supra.*

In *Pennsylvania R. Co.* v. *United States, supra*, the plaintiff railroad brought an action against the United States of America and the Interstate Commerce Commission under the provisions of §§ 17(9), 1336 and 1398 to enjoin, set aside and annul a Commission finding that certain rates were unreasonable and a Commission order denying reconsideration thereof. The Commission determination was made in a proceeding after referral of the question to it by the Court of Claims. In a unanimous deci-

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*Now 28 U.S.C. § 1336.

sion this Court characterized that case as one involving "the power of District Courts to review Interstate Commerce Commission orders determining the reasonableness of rates", pointed out (p. 205) that it had previously held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission, citing *Eldorado Oil Works* v. *United States,* 328 U. S. 12, and concluded that the plaintiff railroad was entitled to have the Commission order judicially reviewed and that jurisdiction to review such an order is vested exclusively in the district courts, citing 28 U.S.C. § 1336, and 49 U.S.C. § 17(9). The court also cited *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122, in which it stated that "federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul, or suspend an order of the Commission", and also that "in such suits the United States is an indispensible party". The Court also held that the order was properly reviewable by a one-judge rather than a three-judge district court because it was essentially one "for the payment of money" within the terms of 28 U.S.C. 2321 and 2325, which exempt such orders from the three-judge court procedure of 28 U.S.C. 2224, citing *United States* v. *I.C.C., supra.*

National Van Lines, Inc. v. *United States,* 326 F. 2d 362 (C. A. 7, 1964), is a decision in substantial accord with the decision of the Court of Appeals in the instant case. That action was brought under Sections 17(9), 1336 and 1398, among others, and sought to set aside administrative findings of the Commission and a declaratory order based thereon. The Court sustained the carrier's right to maintain the action. Although that case involved a question substantially similar to that involved here, neither the Commission nor the United States sought review of that decision by this court.

In summary, the findings and orders assailed in the instant case are substantially the same as those which were

involved in *United States* v. *I.C.C., supra, Pennsylvania R. Co.* v. *United States, supra,* and *National Van Lines, Inc.* v. *United States, supra.* Those cases make it clear that such administrative findings and orders relating to the payment of money are reviewable by the district courts under Section 17(9) and Section 1336.

B. Section 16(2) is not a "review" provision.

Section 16(2) of the Interstate Commerce Act, 49 U.S.C. §16(2), is not "the exclusive method for judicial review of an order of the Commission which awards reparations". It is not a "review" section at all, nor by its language does it purport to be.

Section 16(1) of the Interstate Commerce Act provides that if, after hearing on a complaint, the Commission should determine that any party complainant is entitled to an award of damages for a violation of the act, "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." That paragraph makes it a mandatory duty of the Commission to issue such an order. *George Allison & Co.* v. *Interstate Commerce Com'n,* 107 F. 2d 180.

Section 16(2) provides that if a carrier does not comply with such an order, the complainant, or any person for whose benefit the order was made, may file a complaint in a United States District Court or in any State court of general jurisdiction, having jurisdiction of the parties, setting forth briefly the causes for which he claims damages and the order of the Commission. The section further provides that on the trial of such a suit, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.

A suit brought under the provisions of that section is not one for the "enforcement and review" of the Commission order. It is "a plenary suit for damages actually incurred by the plaintiff, by reason of violation of the Act by the

defendant as conclusively found by the Commission". *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717, 724. This Court has also held that an action under § 16(2) is not one to enforce a reparation order; it is an action for damages. *Lewis, Etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 661.

Section 16(2) is and was clearly intended to be a special procedure which authorizes a complainant before the Commission to initiate a suit to recover damages "if a carrier does not comply with an order for the payment of money within the time limit in such order". The purpose of Congress was "to discourage harassing resistance by a carrier to a reparation order". *St. L. & S. F. R.R.* v. *Spiller*, 275 U. S. 156, 159.

In *Baldwin* v. *Milling Co.*, 307 U. S. 478, this Court stated (p. 482), that "the Act unmistakably evidences purpose directly to prevent interposition of *pleas lacking merit* and so *coercively* to bring about prompt payment of the Commission's awards", citing *St. L. & S. F. R.R.* v. *Spiller*, *supra*. It further stated (p. 483) that "Sections 16(1) and 16(2) indicate legislative purpose to penalize failure of carriers, *having no defense*, to pay damages in accordance with the terms of the commission's findings and reparation orders".*

As a suit for damages rather than a suit to enforce a reparation order it falls within the prohibition of § 17(9) which states that "a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise*".*

In other words, the jurisdiction embodied in § 1336 may not be availed of by a district court in a suit instituted

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* Italics added.

under § 16(2) because such a suit is not one "to enforce, enjoin, suspend, or set aside orders of the Commission".

Thus, § 17(9) by its own terms provides for the "exclusive method for judicial review of an order of the Commission which awards reparation".

Section 17(9) was not enacted until 1940 [54 Stat. 916], almost thirty years after the decision of this Court in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247. If, as this Court there said, the administrative findings are conclusive in a § 16(2) suit, it must follow that district courts are without jurisdiction to review such findings and set them aside. Thus, almost thirty years prior to the enactment of § 17(9) this Court held, at least inferentially, that § 16(2) is not a review section, but, consistent with *Lewis, Etc., Co.* v. *Southern Pac. Co., supra,* is simply a section under which an action for damages may be maintained.

Section 16(2) does not give a district court jurisdiction to enjoin or set aside an administrative finding of unjustness and unreasonableness. Neither does it provide any procedure by which the Commission and the United States may be brought in as necessary parties. In fact, Congress has expressly withheld authority from the Commission to join as a party plaintiff in suits involving orders for the payment of money. 49 U.S.C. § 16(12). Moreover, without the power in a court of law to enjoin, suspend, or set aside administrative findings of the Commission it cannot be said that review, as that term is used in the Interstate Commerce Act, the Administrative Procedure Act, and the Judicial Code, is available to a party. Those statutes expressly include that element of review; Section 16(2) does not, because by its very language it is not a review section.

The uniformity, which is the principal aim of the Interstate Commerce Act and which is discussed in the *Mitchell* and *Philbips* cases, and many other cases of this Court, cannot be accomplished or assured unless the reviewing court also has jurisdiction to enjoin and set aside the

administrative findings which are available to all shippers who have shipped under the condemned rates. Without such jurisdiction a district court can only dismiss the complaint if the administrative findings are held to be invalid or enter judgment if they are upheld. Neither the Commission nor any other district court would be bound by any judgment entered by a district court.

Moreover, the problems created by the contention that § 16(2) is a review section are compounded by the fact that the section also authorizes suits to be brought in state courts. That automatically raises serious questions of the dualism of the federal-state system, questions which require no discussion in this brief.

In any event, even if it be conceded, arguendo, that a carrier is entitled to limited "review" in a § 16(2) suit, the fact still remains, as the lower court pointed out (p. 9a) that "even 100% success in the § 16(2) suit leaves the carrier faced with unsatisfactory law for all to use, and unsatisfactory fact findings for all shippers to use".

II

Petitioner has advanced no valid reasons for granting a writ.

A. Shippers are not deprived of procedural advantages.

The principal argument of the petitioner is that the decision of the lower court will deprive shippers of procedural advantages given to them by the provisions of § 16(2). That contention is wholly without substance.

Only if the findings and order of the Commission are valid does a shipper have a valid cause of action for damages under § 16(2) and a right to the procedural advantages given thereby. If the District Court upholds the Commission's findings and order in a § 17(9) suit by a carrier, the shipper is not denied his right to maintain an action under § 16(2) nor deprived of any of its pro-

cedural advantages. On the other hand, if the reviewing court holds the Commission findings and order invalid and sets them aside, it automatically means that the shipper did not have a valid cause of action under § 16(2) to begin with and, therefore, was neither entitled to nor deprived of any procedural advantage. Moreover, as the decision of the lower court makes clear, under appropriate circumstances a shipper may obtain the benefit of all or part of those statutory advantages by intervening in the § 17(9) suit. That is exactly what a number of successful shippers have done in *Baltimore and Ohio R. Co., et al.* v. *United States, et al.*, Civil Action No. 14897, U.S.D.C. D. Md., one of the suits referred to by the petitioner (p. 6). As the United States stated in its answer to the instant complaint, "the shipper, if it so elects, may present its position through its own counsel". As the court below pointed out (12a-13a), a decree sustaining the basic validity of the findings and order of the Commission would leave interested shippers in an even more advantageous position, since the only remaining issue in a § 16(2) suit would be the limited issue of money damages, an issue which the railroads then would hardly be in a position to challenge. If the findings and order of the Commission fail to pass muster and are, therefore, "not in accordance with law", they may be set aside, and, as the lower court said (11a), "no one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed".

The petitioner deplores (p. 7) "the shipper's loss of his choice of venue". In doing so the petitioner overlooks the simple fact that if a shipper has a valid cause of action for damages under § 16(2) he is at liberty to file his suit and avail himself of all of the procedural advantages provided for in that section, including "his choice of venue". The petitioner also overlooks the fact that the venue provisions of § 1398 are much narrower than those of § 16(2), and are the identical venue provisions available to a shipper seek-

ing judicial review of a Commission order denying an award of reparation. However, the important and undeniable fact of the matter is that it is extremely unusual for railroads to challenge findings and orders in reparation proceedings, small or large. In the comparatively rare instances in which they do challenge them they do so because of the principle involved, not the reparation involved in a particular proceeding. Undoubtedly none of the 22 reparation orders referred to by the petitioner (pp. 7-8) was contested, but was paid promptly and without question.

B. The grounds allegedly relied upon do not impair any congressional policy.

The petitioner refers to the 1948 codification of Title 28, U.S.C. Sections 1336 and 1398, and particularly to the "except" clauses of those sections, and to the fact that those exceptions were identified in the "Revisor's Notes to Section 1398" with Section 16 of the Interstate Commerce Act, 49 U.S.C. 16. But just because the venue provisions of § 1398 do not apply to § 16(2) suits, it does not follow that the district courts were deprived of jurisdiction to review a reparation order under the provisions of § 1336. All that Congress did by the "except" clauses referred to was to exempt from the restricted venue provisions of § 1398 suits for damages brought pursuant to the provisions of § 16(2).

The petitioner assumes (p. 9) that the court below believed that a § 17(9) suit would avoid multiple suits by shippers relying upon Commission findings and orders in reparation cases, and argues that for forty years it has been the settled law that the possibility of "multiplicity of suits" does not warrant depriving shippers "of advantages conferred by Congress", citing *Pittsburgh & W. Va. Ry. Co.* v. *U. S.*, 6 F. 2d 646. The petitioner overlooks the fact that the action there involved was before a three-judge court, which clearly did not have jurisdiction of an action

to enjoin, set aside, and annul a reparation order. It also overlooks the fact that the plaintiff in that case relied solely upon the equity jurisdiction of the court, as distinguished from its statutory jurisdiction with respect to matters arising before the Interstate Commerce Commission, as well as on the sole ground that the order there assailed, unless enjoined, set aside, and annulled, would result in a multiplicity of suits. Equally important is the fact that the case was decided more than sixteen years prior to the enactment of § 17(9) in 1940, and long before the decisions of this Court in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125; *El Dorado Oil Works* v. *United States*, 328 U. S. 12; *United States* v. *I.C.C., supra;* and *Pennsylvania R. Co.* v. *United States, supra.* Moreover, the lower court was much more concerned with ensuring uniform treatment of all shippers similarly situated than it was with the multiplicity of suits aspects.

The petitioner assails (p. 10) the lower court conclusions that "symmetry also suggests a congressional purpose to allow review of an award-order granting reparations under § 17(9)". The petitioner either chooses to disregard or fails to understand the symmetry which the lower court obviously had in mind. The symmetry which the court had in mind had to do with the substantive right to the remedy available under §§ 17(9) and 1336 to a shipper denied reparation by the Commission in a proceeding before it, or to the losing party, whether a shipper or a railroad, in a referral action. All that the lower court did was to point out that a Commission denial of reparation is reviewable under §§ 17(9), 1336, and 1398, as is an administrative determination of primary jurisdiction elements of a referral to the Commission by a court, and to conclude that symmetry or consistency "suggests a congressional purpose to allow review of an order awarding reparation as well". That symmetry does not fail because a shipper seeking review of an order denying reparation must bring suit in the district in which he resides. That is the same venue

provision which governs the review of a referral proceeding. It is not "essentially the same venue advantage which § 16(2) of the Interstate Commerce Act" gives a shipper in a suit for damages. The venue provisions applicable to § 17(9) suits are far more restricted than those of § 16(2). The resort to a venue argument simply reflects an attempt on the part of the petitioner to avoid the sound and logical observation of the lower court.

Furthermore, the principal, if not the only, effect of Public Law No. 88-513, 78 Stat. 695, referred to by the petitioner (p. 11) is to allow the initial court in referral cases, usually the United States Court of Claims, to retain jurisdiction for the purpose of reviewing findings and orders of the Commission.

The petitioner next assails (p. 12) the decision of the court below because one result "will be to permit the transfer of the burden of defending Commission orders awarding reparations from the shipper to the Commission's legal staff". The indignation of the Commission at the thought of having to defend its award orders is surprising, to say the least. Who, if not the Commission, should be required to defend its administrative findings and orders, and who is in as good a position or as well qualified to do so? As the lower court points out (11a-12a) in a suit by a shipper under § 16(2) "the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief", whereas in a suit brought under the provisions of §§ 17(9), 1336, and 1398, the United States and the Commission are made defendants "directly and immediately responsible for * * * the advocative assertion of contentions deemed essential in the public interest".

Finally, the petitioner argues that the decision below conflicts with prior holdings or statements by this Court that a shipper's suit under § 16(2) "is the exclusive route by which the Congress has authorized the courts to deter-

mine the validity of a Commission order awarding reparations". In support of that contention the petitioner cites *United States* v. *I.C.C., supra,* and *Porter Co.* v. *Central Vermont R. Co.,* 366 U. S. 272. In neither of those decisions did this Court make any such holding or statement.

And contrary to the contentions of the petitioner (p. 13), *Washington Terminal Co.* v. *Boswell,* 319 U. S. 732, did not involve provisions of the Railway Labor Act "which are closely analogous to Section 16(2)". As the lower court said (10a), "the resemblance is superficial". Under the provisions of the Railway Labor Act, 45 U.S.C.A. §§ 151, 153 First [p], the District Courts are empowered to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce *or set aside* the order of the adjustment board. No similar sweeping authority is contained or implied in the provisions of § 16(2). Moreover, the procedure created by the Railway Labor Act is not subject to the provisions of the Administrative Procedure Act, 5 U.S.C.A. §§ 1001, *et seq.* As the lower court pointed out (10a), that is not the case here.

III

The memorandum of the United States.

Despite the fact that in its answer the United States of America neither defended nor opposed the Commission orders because "the Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission orders", it now supports the Commission petition for the reason that "it would be a statutory defendant in any action instituted by a carrier to set aside a reparations order of the Commission". Yet it expresses no intention to participate actively in the defense of any such action in the future, and there is nothing in its memorandum which suggests or implies that its answer and position in such cases in the future would not be substantially the same as its answer and position in this case.

The United States argues that the decision below may seriously impair the ability of some shippers to recover reparations awarded them by the Commission, but it makes no attempt to show how or why that might reasonably be expected. There is no basis in the decision of the lower court for the conclusion that "shippers will almost invariably be denied the benefits available to them under Section 16(2)". If a shipper has a valid cause of action for damages under § 16(2), a review action under § 17(9) will not in any way affect his right to maintain that cause of action under § 16(2), or deprive him of any of the benefits available to him under that section. Despite the obvious advantage of having the Commission assume the burden of defending its own findings and orders, shippers who are not content to rely upon the Commission for the protection of their interests in a § 17(9) suit by a railroad may intervene in such a suit if they so elect and present their position through their own counsel. If the findings and order of the Commission are upheld in such a suit, the interested shipper would then be in an even more advantageous position in a § 16(2) suit.

The contention of the United States that there is serious doubt whether the decision of the court below is consistent with the congressional policy reflected in § 16(2) was likewise advanced by the petitioner and has already been answered. It should be noted, however, that the United States as a shipper plaintiff sought review of a denial of reparation by the Commission in *United States* v. *I.C.C.*, *supra*. In that case the United States successfully took the position that §§ 17(9) and 1336 permit review of orders involving the payment of money. It seems very significant that the United States makes no attempt to reconcile the position it took in that case and the diametrically opposite position it takes here.

IV

The *amicus curiae* brief of the National Industrial Traffic League.

The League contends (pp. 2-3) that the practical effect of the decision below will be to enable "obdurate and litigious railroads" to deny shippers, and particularly small shippers, "any effective remedy for reparations for the exaction of unlawful freight rates and charges". That contention is completely preposterous on its face. Unless and until an "obdurate and litigious" railroad succeeds in having an award order enjoined, annulled or set aside under the provisions of §§ 17(9), 1336 and 1398, a shipper would be left with his statutory right to file a § 16(2) suit for damages. If the award order is set aside in a § 17(9) suit because it is "not in accordance with law", it follows that no shipper was deprived of any right or remedy. There is, therefore, no substance to the contention of the League that the practical effect of the decision below is to render § 16(2) in large part a nullity.

Much of the League's argument is in substance a repetition of the argument of the petitioner that the decision of the court below deprives shippers of "procedural benefits" accorded them by Congress, an argument which has already been answered.

The League's reference to "a small shipper" would seem to disclose a wilful lack of knowledge on its part of the facts in this case. In this intance there was no "small shipper in New York", and the "shipper's" § 16(2) suit brought in New York almost a year after the institution of the respondents' suit under § 17(9) was allegedly filed on behalf of an Illinois corporation, dissolved more than five years previously, whose office and principal place of business had been in Chicago, Ill. The extent of the effort of that shipper "to avail itself of its remedy under Section 16(2) has thus far come to naught" because by stipulation its complaint is being held in abeyance pending the final

disposition of the instant proceeding. The shipper has not been deprived of its right under § 16(2), nor of the "advantages" there provided for. The decision of the lower court makes it clear that because of the invalidity of the award order the interested shipper never had a valid cause of action under § 16(2) to begin with, and that any suit brought under that section should properly come to naught.

The League, as *amicus curiae*, raises an issue which the petitioner has not. It contends that a reparation order is not final and, therefore, is not reviewable. There is no substance whatever to that contention. As the lower court stated (6a), a reparation order "has all the characteristics of finality so far regarded as essential to court review under statutes comparable to those here involved", citing *Rochester Tel. Corp.* v. *United States, supra; Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *Frozen Food Express* v. *United States,* 351 U. S. 40; *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192; *El Dorado Oil Works* v. *United States, supra.*

CONCLUSION

For the reasons hereinbefore given, the respondents submit that the petition should be denied.

Respectfully submitted,

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Certificate of Service.

I, J. Edgar McDonald, attorney of record for the respondents in this proceeding, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief on the several parties to this action, as follows:

1. On the petitioner, the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

2. On the United States of America, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorney of record, Archibald Cox, Solicitor General, Department of Justice, Washington, D. C., 20530.

3. On The National Industrial Traffic League, by mailing copies in duly addressed envelopes to its attorneys of record, John F. Donelan and John M. Cleary, 700 Brawner Building, 888 17th Street, N.W., Washington, D. C., 20006.

This 11th day of December, 1964.

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, N. Y.

APPENDIX

Relevant Portions of Statutes Involved

5 U.S.C.A. § 1001(d), (f), and (g):

"(d) 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

"(f) 'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person."

"(g) 'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

5 U.S.C.A. § 1009:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."